January 28, 2019

Ms. Roxanne Rothschild
Acting Executive Secretary
National Labor Relations Board
1015 Half Street S.E.
Washington, DC 20570

Sent via email to: Regulations@nlrb.gov,

RE: RIN 3142-AA13; Comment on National Labor Relations Board's Proposed Rule Relating to Standard for Determining Joint-Employer Status

Dear Ms. Rothschild:

The Society for Human Resource Management ("SHRM") is pleased to comment on the National Labor Relations Board's ("NLRB" or "Board") Notice of Proposed Rulemaking ("NPRM"), published at 83 Fed. Reg. No. 179, 46681 (Sept. 14, 2018). The purpose behind the rule is to establish a clear and distinct standard to use in evaluating whether a joint employer relationship exists between two or more parties. The following comments intend to provide empirical evidence and reasons favoring adoption of the rule.

The Society for Human Resource Management (SHRM) is the world's largest HR professional society, representing 300,000 members across all industries and in more than 165 countries. For nearly seven decades, the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management.

I. Overview of Position

The Board's proposed joint employer rule is of particular interest to SHRM because in today's economy, businesses are increasingly employing flexible staffing solutions that may raise questions under the Board's *Browning-Ferris* ("BFI") decision. Awareness of the circumstances which create an employment relationship based on both the acts of, and agreements between, the parties involved is at the core of human resource management. For this reason, establishment of clear standards for the employer-employee relationship is critical. SHRM supports the Board's proposed rule regarding the standard for determining joint-employer status.

II. Summary of Comments

SHRM supports the Board's proposed revision to the standard for determining joint-employer status to ensure consistency in its application and to avoid any future uncertainty. Further, SHRM asserts the following:

- The Board has the appropriate authority to promulgate the rule and the rule is consistent with a long history of well-established legal precedent;

- Empirical evidence shows that the current standard for determining joint employment has had a negative impact on a wide variety of business relationships, including franchising and the hospitality industry[1]; and

- The proposed rule's enactment will create a sound labor policy which serves to encourage judicial economy across every jurisdiction, foster predictability for employers, employees, and unions alike and limit the involvement of unnecessary third parties in the collective bargaining process.

III. Recommended Revision to the Proposed Rule Text to Avoid Uncertainty in Application

Preliminarily, the Board's proposed § 103.40 related to joint employers may be separated into two distinct parts:

> (1) An employer, as defined by Section 2(2) of the National Labor Relations Act ("the Act"), may be considered a joint employer of a separate employer's employees only if the two employers ***share or codetermine*** the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction; [2] and
>
> (2) A putative joint employer must possess and actually exercise substantial direct and immediate control over the employee's essential terms and conditions of employment in a manner that is not limited and routine.[3]

We believe that the rule's use of the phrase "***share or*** codetermine" as referenced in part (1) may tend to cause uncertainty in relation to the rule's ultimate purpose codified in part (2), and so it is SHRM's recommendation to the Board that the phrase "***share or***" be eliminated from the first part of the rule in order to remove any existing doubt and ensure that both parts are fully cohesive with each other.

The term "codetermine" necessarily implies that a putative joint employer maintains some type of *active* role in setting the essential terms and conditions of employment and "actually exercise[s]" that control consistent with the language in the second part of the rule. We believe this reflects the appropriate level of involvement necessary for joint employment. In contrast, the phrase "***share or***" implies that an employer with the *right* to take an active role in setting

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[1] The current standard is set forth in *Browning-Ferris Industries of Cal., Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) (petition for review docketed *Browning-Ferris Indus. of Cal. v. NLRB*, No. 16-1028 (D.C. Cir. Jan. 20, 2016)) ("*BFI*").

[2] The language in paragraph (1) of the proposed rule is consistent with historical common law analysis and the holding in *BFI* that "[t]he Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment . . . such as hiring, firing, discipline, supervision, and direction." *BFI*, 362 NLRB No. 186 at 15-16.

[3] *See* proposed joint employer rule, 83 Fed. Reg. 179 (Sept. 14, 2018), available at https://www.gpo.gov/fdsys/pkg/FR-2018-09-14/pdf/2018-19930.pdf. (emphasis added).

the essential terms and conditions of employment may be considered a joint employer regardless of whether there is any exercise of control. This language is reflective of the vague standard that is currently in place as a result of the *BFI* decision and is incompatible with the NLRB's proposed definition of joint employer. SHRM believes that the elimination of the "***share or***" language will make the standard more exact, clear, and concise, leading to a more precise and consistent application of the rule without affecting its purpose or substance.

IV. Authority to Enact the Proposed Rule

The Taft-Hartley amendment gives the NLRB legal authority to develop rules and regulations which may be necessary to carry out the Board's primary purposes — to encourage the practice and procedure of collective bargaining to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations with each other, and to protect the rights of workers in the negotiations of the terms and conditions of their employment.[4] 29 U.S.C. §§ 141; 151; 156. Each of these purposes is served by enacting a clearly defined standard for determining joint employer status given the present vague and unclear status surrounding the joint employer issue. Thus, present circumstances clearly present a logical and appropriate time for the Board to exercise its rulemaking authority, regardless of whether the Board has chosen in the past to utilize that authority sparingly.

Additional support for adoption of the rule exists in the form of proposed federal legislation currently pending in Congress. The Save Local Business Act (the "Act"), a bipartisan bill which already passed through the House of Representatives in November of 2017 (currently pending in the Senate), closely resembles the Board's proposed joint employer standard and seeks to amend the present standard in order to provide a more consistent framework to evaluate the joint employer relationship. H.R. 3441, 115th Cong. § 2 (2017). The Act provides that:

> a person may be considered a joint employer in relation to an employee only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over the essential terms and conditions of employment, such as hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, or administering employee discipline.

Id. Clearly, the joint employer issue — and more specifically the current overbroad standard as set forth in the recent *BFI* decision — have caused concern for members of Congress. Yet members on both sides of the aisle have agreed on a non-partisan bill designed to codify into law the substance of the Board's proposed rule. We believe the Board should likewise exercise its rulemaking authority by adopting the proposed joint employer rule.

[4] Currently there is a bill pending in Congress to limit the Board's rulemaking authority only to "rules concerning the internal functions of the Board," and remove authority to promulgate "rules or regulations that affect the substantive or procedural rights of any person, employer, employee, or labor organization . . ." S. 1594, 115th Cong. § 2 (2017).

V. Empirical Evidence Provides Support for Adopting the Joint Employer Rule

A. Negative Impact on Business Relationships – Example of the Hospitality Industry

Hospitality provides a powerful example of the substantial negative impact that the expansive joint employer standard postulated by the Board's 2015 *BFI* ruling has had on an industry where a significant segment of the workforce is employed by franchisees.[5] The American Action Forum conducted initial research which showed that from 2011 to 2015 (prior to the *BFI* ruling), employment in hotel franchisees and non-franchisees grew at an annual rate of 1.8 percent and 1.9 percent, respectively.[6] In 2016 (post-*BFI*), hotel franchise job growth dropped an astounding 71 percent (to .40 percent) compared to non-franchise job growth declining by only 26 percent (to 1.4 percent). *Id*.

This alarming trend of steadily declining job growth in hotel franchise employment continued in 2017 and 2018. Conversely, non-franchised employment grew at a much more substantial rate from 2016 to 2017 — approximately three percent.[7] Such substantial differences between franchise and non-franchise employment within the same industry strongly points to the negative effect that the current joint employer standard has had in the accommodations industry to the point where businesses are electing to franchise less, given the presence of the unknown. These results illustrate the predictions made by leaders in the hotel and accommodations industry, including Chip Rogers (President and CEO of the Asian American Hotel Owners Association)[8] and the American Hotel & Lodging Association ("AHLA") in response to the *BFI* decision.[9] Quite simply, fewer franchises lead to fewer franchise jobs being available.

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[5] Approximately 33 percent of all workers in the accommodations industry are employed by franchisees. *See* FN. 8 for calculation.

[6] Ben Gitis, *Trends in Hotel Employment, Hours, and Wages Since the NLRB Broadened the Joint Employer Standard*, American Action Forum (Sept. 11, 2017), *available at*: https://www.americanactionforum.org/research/trends-hotel-employment-hours-wages-since-nlrb-broadened-joint-employer-standard/.

[7] Found by taking the total number of workers in the accommodations industry in 2016 (1,943,467) minus franchised workers in the accommodation industry in 2016 (655,800), which equates to 1,287,667 non-franchised workers in the accommodations industry in 2016. Using the same formula for 2017 (1,984,922 total workers in the accommodations industry) minus (658,800 franchised workers), equates to 1,326,422 non-franchised workers in the accommodations industry. The percentage difference between the two (1,287,667 and 1,326,422) equates to a three percent increase. Quarterly Census of Employment and Wages are from U.S. Dept. of Labor Bureau of Labor Statistics, *available at*: https://www.bls.gov/cew/.

[8] In response to the NLRB's proposed rule, Mr. Rogers issued the following statement: "America's hotel owners applaud this important step toward resolving the confusion stemming from the disastrous [*BFI*] ruling that upended the franchise industry." Hotel Business, *NLRB Proposes Rule Change to its Joint Employer Standard* (Sept. 17, 2018), *available at*: https://www.hotelbusiness.com/nlrb-proposes-rule-to-change-its-joint-employer-standard/.

[9] In response to the *BFI* decision, the AHLA issued the following statement: "we are very concerned that these changes to the joint-employer standard will have a profound negative impact on economic investment and job growth across our industry." AHLA, *Hotel Industry Opposes NLRB Joint-Employer Decision* (Aug. 27, 2015), *available at*: https://www.ahla.com/press-release/hotel-industry-opposes-nlrb-joint-employer-decision. Empirical evidence shows that the AHLA's concerns have been validated.

B. Defending Against Unnecessary Litigation Costs and the Case of *Tashima Little v. TMI Hospitality, Inc., Marriot International, Inc.*, *and John Doe*

The negative impact of the current overbroad joint employer standard on organizational costs is illustrated by *Tashima Little v. TMI Hospitality, Inc., Marriot International, Inc.*, *and John Doe*, Case No. 2:15-cv-02204.[10] In this particular case, Marriot (a corporation with its principal place of business in Maryland) entered into a franchise agreement with TMI, a hotel operator located in Illinois. Among the various allegations included in the Complaint were claims of unlawful termination and discrimination for acts alleged to have been committed by an assistant manager who was employed solely by the franchisee TMI. *Id*. Plaintiff's theory of liability with respect to Marriot — that Marriot may be liable for the acts of the franchisee's employee simply because it allegedly had the ***potential*** to control the franchisee — is indicative of the negative impact that the current overbroad joint employer standard has had on the franchise model. In this particular case, Plaintiff had no specific knowledge of Marriot's relationship with, or control over (if any) TMI, other than the bare recital in the Complaint that TMI operated under a "franchise or other licensing agreement" with Marriot. While Marriot was ultimately dismissed as a party by Plaintiff in April of 2017, it was still required to expend its resources defending against the lawsuit for nearly two years because of the long-arm effect of the current standard adopted by *BFI*, a standard which deviated from thirty-plus years of legal precedent.

Employers, like Marriot in this case, inevitably end up incurring substantial costs in defending against lawsuits even though they may play only a passive role consistent with the terms of a franchise agreement. Consequently, the courts and the judicial process become bogged down with otherwise avoidable legal issues that require unnecessary litigation.

The consequences of *BFI* as described in these comments represent "real-world experiences," and not simply "empty rhetoric"[11] referred to in Member McFerrin's dissent to the proposed rule.

VI. The Proposed Joint Employer Rule Will Promote Judicial Economy Through A Consistent and Specific Standard to Apply Regardless of Circumstances

The proposed rule provides a clear standard establishing the circumstances whereby a joint employer relationship is created and will lead to uniformity in judicial opinions across multiple jurisdictions and in-turn, help to promote judicial economy. Circuit court remands to the Board involving issues related to joint employment will be reduced because Board decisions will become more consistent with a clearly defined rule that can be applied in every situation. Furthermore, without a unified definition presently, businesses which operate in multiple states and across multiple jurisdictions are subject to various interpretations of the circumstances that might tend to create a joint employer relationship, a situation made even more confusing since *BFI*. The best illustration of the current division among the different Circuits regarding what constitutes a "joint employer" is to review and summarize each Circuit's particular standard

[10] Electronic version *available at*: https://www.bluemaumau.org/sites/default/files/Little%20v%20TMI%20Hospitality%20Amended%20Complaint.pdf.

[11] *See* Proposed Rule, 83 Fed. Reg. at 46692 (Member L. McFerran dissenting).

prior to *BFI*. Notably, while some Circuits indicate that the appropriate standard is whether the putative employer "possesses" the right to control or has the "potential" to control, the analysis and reasoning in every case tend to focus on the putative employer's "exercise" of control without making any distinction between the two. The NLRB's proposed joint employer rule seeks to delineate this distinction and offer clarity in line with the reasoning in the majority of the cases — that the *exercise of control* over the essential terms and conditions of employment is the critical component in establishing a joint employer relationship.

A. Terms and Standards Used Among the Different Circuits

The First Circuit[12] has noted that it has no "specific test to use in evaluating whether a joint relationship exists." *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 306 (1st Cir. 1993). The Court has found that a joint employment relationship may be established under circumstances where the employer's "supervision ***exercised*** by [employer] over [employee] . . . was more than routine" given "the power of supervision and direction that [the employer] ***exercised*** over [the employees] once they reported to work." *Id*. at 307 (emphasis added).

The Second Circuit[13] has established a test which examines "evidence of ***immediate control*** over the employees." *Clinton's Ditch Co-Op Co., Inc. v. NLRB*, 778 F.2d 132, 138-39 (2nd Cir. 1985) (emphasis added). In finding no joint employer relationship, the Court examined evidence of immediate control by focusing on four relevant factors, including the employer's lack of control over: (1) hiring and firing; (2) imposing discipline against employees (as opposed to merely reporting problems with employees to the actual employer); (3) pay, payroll, benefits or insurance provided to the employees (distinguishing a *de minimus* vacation pay for a short period of time); and (4) frequent supervision of the employees (distinguishing infrequent supervision that occurred on average less than once per month). *Id*.

The Third Circuit's[14] standard perhaps most closely resembles the proposed rule: a joint employment relationship exists when "two or more employers ***exert significant control*** over the same employees . . . [and] that they share or co-determine those matters governing essential terms and conditions of employment." *NLRB v. Browning-Ferris Industries of Penn., Inc.*, 691 F.2d 1117, 1124 (3rd Cir. 1982) (emphasis added).[15]

The Fourth Circuit[16] has posed two different and conflicting standards. First is whether the employer "***possess[es]*** sufficient indicia of control over the work of the employees." *NLRB v. Jewell Smokeless Coal Corp.*, 435 F.2d 1270, 1271 (4th Cir. 1970) (per curiam) (emphasis

[12] The First Circuit includes the district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

[13] The Second Circuit includes district courts in Connecticut, New York, and Vermont.

[14] The Third Circuit includes district courts in Delaware, New Jersey, and Pennsylvania.

[15] The Court found a joint employer relationship in circumstances where the putative joint employer: (1) had the right to hire (and approve of hires) and fire employees, and when the supervisor both considered himself "boss" and acted as "boss" with respect to the employees' functions and the rules under which they operated; (2) established the employees' work hours; (3) provided the employees with the same uniforms as its own employees; and (4) shared in both determining the employees' compensation and in the supervision of the employees. *Id.* at 1124-25.

[16] The Fourth Circuit includes district courts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

added).[17] The second standard includes whether the employer "***exercised control*** over [the] employees." *NLRB v. Gibraltar Indus., Inc*., 307 F.2d 428, 430 (4th Cir. 1962) (emphasis added).

The Fifth Circuit[18] has adopted a standard of whether the putative joint employer has "***exercised its control*** . . . over matters governing essential terms and conditions of employment." *Ref-Chem Co. v. NLRB*, 418 F.2d 127, 129 (5th Cir. 1969) (emphasis added). In its reasoning, however, the Court found the existence of a joint employer relationship based on the putative employer's "***right*** to approve employees, control the number of employees, have an employee removed, inspect and approve work, [and] pass on changes in pay and overtime allowed." *Id*.

Similar to the Fourth Circuit, the Sixth Circuit[19] has adopted what appear to be two different standards for determining joint employer status. For example, one standard that has been used is whether the employer "***possess[es]*** sufficient indicia of control" over workers. *NLRB v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966) (emphasis added).[20] Conversely, the Sixth Circuit has also stated that "the proper legal standard to determine if a joint employer relationship exists [w]here two or more employers ***exert significant control*** over the same employees . . . [and] that they share or co-determine those matters governing essential terms and conditions of employment." *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985) (quoting *Browning-Ferris Industries*, 691 F.2d at 1124) (internal quotations omitted) (emphasis added).

The Seventh Circuit[21] has indicated that its standard for determining a whether a joint employer relationship exists is "only if [the employer] ***exert[s] significant control*** over [the employee]." *G. Heileman Brewing Co., Inc. v. NLRB*, 879 F.2d 1526, 1530 (7th Cir. 1989) (emphasis added). In upholding the Board's finding of joint employment, the Court noted the relevance of "such factors as the supervision of the employees' day to day activities, authority to hire or fire employees, promulgation of work rules and conditions of employment, work assignments, and issuance of operating instructions." *Id*. at 1531 (quoting *W.W. Grainger, Inc. v. NLRB*, 860 F.2d 244, 247 (7th Cir. 1988)).[22]

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[17] In upholding the Board's finding of a joint employer relationship, the Court looked to the fact that the putative joint employer loaned money to the employees to purchase equipment, provided worker's compensation coverage to the employees in addition to engineering services and safety inspections of the premises, and (most significantly) terminated the work by cutting off the power to the workplace. *Id.* at 1271-72.

[18] The Fifth Circuit includes district courts in Louisiana, Mississippi, and Texas.

[19] The Sixth Circuit includes district courts in Kentucky, Michigan, Ohio, and Tennessee.

[20] In upholding the Board's finding of the existence of a joint employer relationship, the Court determined that the putative employer advertised for drivers (the employees), interviewed the employees and then recommended them for employment to individual cab owners, directed the employees to report to specific locations, reported infractions of the rules to supervisors, supplied the employees with a manual containing a set of rules along with standard forms, trip sheets and receipt books, and met weekly to consider complaints and recommend disciplinary measures (including termination) to the individual cab owners. *Id.* at 695.

[21] The Seventh Circuit includes district courts in Illinois, Indiana, and Wisconsin.

[22] Specifically, the Court found a joint employer relationship because the putative joint employer was responsible for establishing some of the terms and conditions under which the employees worked, controlled the hiring of the

The Eighth Circuit[23] has taken an entirely different approach than the other Circuits in developing its test which examines "whether sufficient integration exists" between the employer and the employee. *Pulitzer Pub. Co. v. NLRB*, 618 F.2d 1275, 1278 (8th Cir. 1980). This four-part test considers (with an emphasis of stress placed on the first three factors): "(1) some functional interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control." *Id*. at 1279.[24]

The Ninth Circuit's[25] standard may be summarized as follows: "[a] joint employer relationship exists when an employer ***exercises authority*** over employment conditions which are within the area of mandatory collective bargaining." *Sun-Maid Growers of Cal. v. NLRB*, 618 F.2d 56, 59 (9th Cir. 1980) (citing *Gallenkamp Stores Co. v. NLRB*, 402 F.2d 525 (9th Cir. 1968))[26] (emphasis added).[27]

Based on research, it appears as though the Tenth Circuit[28] has not adopted a joint employer standard for purposes of collective bargaining, although at least one district court has identified that the key issue is whether the employer "***exercised substantial control*** over significant aspects of the compensation, terms, conditions, or privileges of the [] employee's employment. If an employer did not exercise such control, the employee is not deemed an employee of that employer." *Burdett v. Abrasive Engineering & Tech., Inc.*, 989 F.Supp. 1107, 1111 (D. Kan. Oct. 31, 1997) (citing in part to *Gibraltar*, 307 F.2d at 428 (emphasis added).[29]

Finally, the Eleventh Circuit[30] has adopted a standard where "[t]he existence of a joint employer relationship depends on the control which one employer ***exercises, or potentially exercises***, over the labor relations policy of the other." *North American Soccer League v. NLRB*, 613 F.2d 1379, 1382 (11th Cir. 1980) (emphasis added). The Court upheld the Board's

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employees, provided supervision and guidance when needed, initiated disciplinary action against the employees, and treated the employees in the same manner as its own employees (same time clock and time card, lockers, lunch room, and benefits). *Heileman*, 879 F.2d at 1531-32.

[23] The Eight Circuit includes district courts in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

[24] The Eighth Circuit's approach to the joint employer standard has been criticized by the Third Circuit for the reason that the Eighth Circuit's test blurs the distinct concepts of "joint employer" and "single employer." *See BFI*, 691 F.2d at 1121-22.

[25] The Ninth Circuit includes district courts in Alaska, Arizona, California, and Hawaii.

[26] *Gallenkamp* held that there was a joint employer relationship because the employer "ha[d] already ***exercised*** its authority with respect to a number of employment conditions . . ." (including the approval of hires, requiring employees to attend mandatory training, controlling the advertising, merchandising and physical arrangement of the store, and fixing the hours of operation). *Gallenkamp*, 402 F.2d at 529 (emphasis added).

[27] The Court upheld the Board's finding of a joint employer relationship because the employer controlled the worker's schedules (including when overtime was needed), assigned the work to the employees and decided when additional employees were necessary. *Sun-Maid*, 618 F.2d at 58-59.

[28] The Tenth Circuit includes Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

[29] Although *Burdett* involved a claim under Title VII, the Court cited to a 4th Circuit case (*Gibraltar*) wherein the ultimate issue for collective bargaining purposes was whether the employer "exercised control over [the] employees." *Gibraltar*, 307 F.2d at 430.

[30] The Eleventh Circuit includes district courts in Alabama, Florida, and Georgia.

determination of a joint employer relationship where the employer established the rules governing player [employee] conduct and imposed discipline for any such violations, restricted the means by which the employees might be acquired by a team, drafted standard employment contracts that the employees were required to sign, and reviewed every employee contract for approval. *Id*. While the evidence clearly showed that the putative employer exercised its authority in each of these regards, what is left unclear is the interpretation of the phrase "or potentially exercises."

Adopting a single, clear and concise joint employer standard will help resolve all of the confusion which currently exists among the various Circuits. Indeed, at least one Circuit (the Eighth) applies a standard which has been questioned by other Circuits and is so unlike the others in that it examines whether there exists "sufficient integration" between the parties. In conclusion, prior to *BFI*, different Circuits adopted distinct standards for determining joint employer status — the majority of which required the employer to exercise some degree of control over the employees — meaning the *BFI* decision was contrary to existing law in most of the Circuit Courts of Appeals. However, even among the Circuits which appear to follow the same (or similar) joint employer standard with respect to the required manner of control, differences abound. The following provides a brief summary of each Circuit's variation of the standard:

- The employer ***"exercising"*** control over:
  - the supervision and direction of the employees (First Circuit);
  - the employees (Fourth Circuit);
  - matters governing essential terms and conditions of employment (Fifth Circuit — although its reasoning was based on the putative employer's right to control); and
  - employment conditions which are within the area of mandatory collective bargaining (Ninth Circuit).
- The employer's ***"immediate"*** control over the employees (Second Circuit);
- The employer ***"exerting significant"*** control over:
  - the employees (the Third, Sixth, and Seventh Circuits); and
  - those matters governing essential terms and conditions of employment (the Third and Sixth Circuits).
- The employer's ***"possess[ion]"*** of control over:
  - the work of the employees (Fourth Circuit); and
  - the employees (Sixth Circuit).
- No known standard (Tenth Circuit).
- The ***"exercise, or potential exercise"*** of control over:
  - the labor relations policy of the employees (Eleventh Circuit).

What is particularly evident from this Circuit-by-Circuit analysis is that the *BFI* ruling was completely misguided and a total deviation from existing precedent, as the majority of Circuits have indicated that the employer must exercise some degree of control over the employees in order to create a joint employer relationship. Indeed, not one Circuit has *exclusively* used the term "possess" (i.e. the *right*) in relation to an employer's control over employees.

Although *BFI* argued that "1984 marked the beginning of a 30-year period during which the Board — without any explanation or without even acknowledgement and without overruling a single prior decision — imposed additional requirements that effectively narrowed the joint-

employer standard" (i.e. requiring the actual exercise of control), this argument completely ignores the reality of existing precedent. *BFI*, 362 NLRB No. 186 at 13. By way of example, in *California Labor Industries, Inc. and Provision House Workers Union Local 274*, 249 NLRB No. 87, 600 (May 16, 1980), the Board determined that no joint employer relationship existed when the putative employer "***retain[ed] the right*** to inspect the production area, to see that its meat [was] being cut and trimmed according to its specifications, and to bring its complaints to the attention of the [e]mployer's supervisors," because there was only "limited instances of [the putative joint employer's] ***participation*** in the management of the [e]mployer." *Id*. at 601 (emphasis added). Similarly, in *Rose Knitting Mills, Inc. and Boclaire Fabrics, Inc. and Knitgoods Workers' Union, Local 115*, 237 NLRB No. 123, 1382 (Aug. 28, 1978), the Board determined that the "key test" for determining the existence of a joint employer relationship is "whether there is ***active, and not merely potential, control*** of labor relations policies by one [employer] over the other." *Id*. at 1384 (emphasis added). Likewise, in *Charlene Lobianco, d/b/a Loby's Cafeteria and Hotel & Restaurant Employees and Bartender's Union*, 192 NLRB No. 109, 752 (Aug. 18, 1971), the Board determined that no joint employer relationship existed where the agreement gave the putative joint employer the ***authority to terminate*** any employee for performance-related reasons, but "[the employer] ***exercise[ed] no authority*** over [the] employees" (i.e. the authority to terminate the employees). *Id*. at 753 (emphasis added).

Additionally, Circuit Court decisions predating 1984 from the Third, Fourth, Fifth, Sixth, Ninth and Tenth Circuits have all been cited as having held that the appropriate joint employer standard is determined by the employer's ***exercise*** of control over the workers.

Clearly, there is a need for the Board to finalize the proposed rule to replace *BFI* with a consistent standard to be applied across every jurisdiction and foster predictability in the workplace.

B. The Proposed Joint Employer Rule Will Create Predictability in the Workplace

Given the wide range of conflicting joint employer standards across various jurisdictions — and in some cases within a single Circuit — we believe that the Board's proposed rule will remove all doubt as to the appropriate standard that should be applied without regard to where the business might be located or headquartered. Functionally, for example, if a franchisor has the same business in both Pennsylvania and Michigan and each business operates under the same franchise agreement, the same joint employer standard should always be applicable regardless of the locale of the business. Thus, whether the business operates in Pennsylvania versus Michigan (or anywhere else) should be inconsequential to the determination of whether the relationship between the franchisor and franchisee or any other type of business relationship creates a joint employer status. The franchisor-franchisee, manufacturer-dealer, contractor-subcontractor, user employer-supplier employer, parent-subsidiary, etc. may rest assured in knowing the legal status of their relationship and be able to maintain an autonomous relationship if they so choose.

C. The Joint Employer Rule Limits Unnecessary Third-Party Involvement in the Collective Bargaining Process

The consequences of creating unexpected joint employer relationships can be significant. With such a vague standard currently in place, the parties may not realize that a joint employer relationship has been established. Collective bargaining should be limited to those necessary parties involved — the employer, the employee and the union. A third party who never affects the employees' essential terms and conditions of employment, who never hires, fires, disciplines, supervises, or directs employees for example, might be considered a joint employer under the current standard simply because the contract or agreement between the parties may give the third party the *authority* to perform one of these acts or some combination thereof. When it comes time to engage in collective bargaining, under the current standard, a third-party may be determined to be a joint employer and required to sit down at the bargaining table with the employer, the employees and the union, even though it has never determined or controlled any term or condition of the employees' employment. We do not believe that this overly broad standard is beneficial nor necessary for any of the principal parties to the bargaining relationship. Rather, bringing unnecessary parties to the bargaining table effectively impedes meaningful collective bargaining and negotiations. It is our view that the proposed rule's clear standard will eliminate this risk.

VII. Conclusion

In sum, we believe that authority exists for the Board to promulgate the rule, empirical evidence shows that the current standard has had a negative impact on franchising in the accommodations industry and other types of business relationships, and that the proposed rule will create sound policy which may be consistently and predictably applied and limit the involvement of unnecessary third parties in the collective bargaining process.

SHRM thanks the Board for the opportunity to present its views on this very important issue.

Sincerely,

Emily M. Dickens, J.D.
Corporate Secretary and Chief of Staff
Society for Human Resource Management